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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HENRY JOE AVALOS, Defendant and Appellant.	E048550 (Super.Ct.No. BLF003011) OPINION

APPEAL from the Superior Court of Riverside County. John J. Ryan, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Henry Joe Avalos, of attempted willful premeditated and deliberate murder (Pen. Code, §§ 664 & 187, subd. (a))[1] during which he discharged a firearm proximately causing great bodily injury (§ 12022.53, subd. (d)) and assault with a firearm (§ 245, subd. (a)(2)), during which he used a firearm (§ 12022.5, subd. (a)(1)) and inflicted serious bodily injury (§ 12022.7, subd. (a)). In bifurcated proceedings, the trial court found true allegations that defendant suffered two prior convictions for which he served prison terms (§ 667.5, subd. (b)). Defendant was sentenced to prison for life plus 25 years to life. He appeals, contending there was insufficient evidence to support the jury's finding that the attempted murder was premeditated and deliberate and to support his conviction of attempted murder and the jury should have been instructed as to self-defense. We reject his contentions and affirm, while directing the trial court to correct errors in the abstract of judgment and the minutes of the sentencing hearing.

FACTS

The victim testified at trial that around 11:20 p.m. on December 20, 2003, he and two companions were in the front yard of the home of a friend where the victim was staying and were about to leave in a small car belonging to one of the friends that was parked out in front of the house. There was a party going on down the street, so there was some traffic in the area, but the victim, who was standing on the sidewalk, noticed one large car in particular driving down the street very slowly and hugging the curb. The victim, who was high on methamphetamine and alcohol, said he thought he saw a female

[1] All further statutory references are to the Penal Code unless otherwise indicated.

in the large car, but afterwards, his friends told him that defendant had been inside. Although at trial, he had no recollection of seeing defendant inside this car or of participating in mad-dogging with defendant, the victim admitted that he had told the police this after the crimes, therefore, both things must have happened. He admitted that mad-dogging a stranger is risky. The victim then got into his friend's small car. Defendant appeared in the area where the victim had been standing when the large car had passed by and yelled, while pointing, "Where's that guy that was standing right here?" The victim jumped out of his friend's car. The victim, with his hands at his sides, approached, but did not charge defendant, stopping when he was about three feet from him and said that he was the guy who had been standing there. Defendant said, "'Don't you know who I am?'" The victim replied, "'No, I don't.'" Defendant said his name was Henry Joe Avalos. He then pulled out a gun, held it sideways as he thrust his arm towards the victim and fired two shots as defendant stepped back, which hit the victim in the right chest and lower abdomen. Defendant ran off. The victim denied that he lunged at, made threatening gestures at, tried to start a street fight with or pointed weapons at defendant at the time defendant shot him. The victim fell to the ground and blacked out. Although he had no recollection of anything that occurred after until he awoke in the Intensive Care Unit at the hospital, he admitted that he took the methamphetamine that was in his pocket and threw it away before the police arrived. He did not remember having a knife in his pocket.

In a statement the victim made to police six days after the incident while he was still at the hospital, the victim added the following to the facts he testified to at trial: He

had watched and mad-dogged the shooter who was in the large car as it drove slowly down the street before the shooting. When the victim got out of the small car and approached defendant, the victim said, "'Well, do you need something?'" After defendant asked the victim if he knew who defendant was, the victim replied, "'Apparently, I don't.'" The victim had his hands in his pockets at this time. The shooter removed the gun from his baggy pants.

As a result of the shooting, the victim's lung collapsed, he could not breathe and his lungs were still not fully functioning at the time of trial six years later. He also had to undergo three to four major surgeries to repair the damage to his intestines during the year and a half following the incident—he had a colostomy bag for eight to nine months after the shooting.

The owner of the small car testified that he had been using marijuana and methamphetamine that night. He said that the large car drove by slowly with two people inside. A short time later, the large car drove by slowly again. This time, the victim and the passenger in the large car looked at each other. The passenger was mad-dogging the victim. The passenger later walked up to the spot where the victim had been standing. At the time, the victim was in the back seat of the small car and two of his companions were in the front. The passenger asked where the person who had been standing there was. The victim got out of the small car and walked over to the passenger and the two started talking. The victim said something like, "It's me." As both stood,[2] the passenger

[2] The victim was not charging defendant.

said his name was Henry Joe, pulled out a gun and fired three shots. The victim was not aggressing on defendant when the victim was shot.

Another of defendant's companions claimed at trial that he had been strung out that night and, therefore, he could not remember at trial what had occurred. He testified he was also high when the police interviewed him.[3] He told the police three days after the incident that while the victim and two others were in the small car, defendant walked up and asked who the fool was that had been standing there. The victim said, "What?" and defendant repeated the question. The victim got out of the small car, walked towards defendant and when he got eight feet from defendant, defendant pulled out a gun and shot at the victim five times, as defendant stepped back into the street.[4] The companion began running and ran around the house, then circled back to check on the victim, who told him to get out of there, which the companion did.

The front seat passenger of the small car testified at trial that he was high on methamphetamine and the large car had driven by slowly twice before the shooting. He knew defendant from prior encounters. He recognized defendant's voice as the same as that of the man who asked, "'Where's the guy that was just standing on the corner?'" and he assumed it was defendant and it probably was. The man whom the victim had

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[3] The officer who interviewed him denied that he exhibited any symptoms of being intoxicated.

[4] During an unrecorded earlier portion of this interview, the companion had said that he saw defendant shoot the victim and defendant fired as he stepped back into the street, which was consistent with the expended shells found there.

approached[5] and stood three feet away from then asked the victim for his name. The victim said his name was Victor and the other man said his name was Henry Joe,[6] then he fired the shots. The front seat passenger did not see the first few shots fired but when he looked over after, he saw the shooter running backward and running away while continuing to shoot, but up in the air. The front seat passenger picked out defendant's picture from a photo lineup he was shown on January 6, 2004.

The front seat passenger told the police on January 6, 2004 that the large car had driven by twice and the people inside the car had looked at them. After the shooter asked where the person was who had been standing in the spot the victim had while the large car had driven by, the victim got out of the small car, walked up to the shooter and said, "What's up Holmes?" The shooter asked the victim his name, which the victim gave, then the shooter said, "'I'm Henry Joe.'" The shooter, who had his hand in his pocket, pulled it out with a gun in it and shot the victim three to four times.

Only two expended shell casings were found in the street after the crimes.

A police detective who interviewed the front seat passenger said that the latter first claimed that it was defendant who pulled a gun out of his pants pocket and shot the victim, and he knew defendant from prior contact. He picked out defendant's picture from a photo lineup.

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[5] The front seat passenger testified he was not sure this man was defendant.

[6] The front seat passenger recognized the voice of this man as defendant's.

Defendant did not testify at trial and no pretrial statements by him were admitted into evidence.

ISSUES AND DISCUSSION

1. *Insufficient Evidence*

A judgment of conviction will not be set aside for insufficiency of the evidence unless it is clearly shown there is no basis on which the evidence can support the jury's conclusion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) When considering the sufficiency of the evidence, we review the entire record in the light most favorable to the verdict drawing all reasonable inferences from the evidence that support that verdict. (*People v. Farnam* (2002) 28 Cal.4th 107, 143.) Given this court's limited role on appeal, defendant bears an enormous burden in claiming there was insufficient evidence to support the verdict.

a. Of Premeditation and Deliberation

While acknowledging that "[e]xisting case law . . . requires some reflection," defendant's assertion that the facts of this case do not support the jury's finding of premeditation and deliberation based on the so called "accepted definitions of these . . . terms" reads more like a closing argument to the jury than an analysis of the insufficiency of the evidence on appeal under the above-cited authorities. Of course, the jury rejected defendant's argument, which was its right to do. Defendant's description of the shooting as a "rash act" is just that—his interpretation. The jury saw it differently and we must give deference to the inferences it drew because they are reasonable and supported by the evidence.

As to specific points, defendant asserts that there was no evidence of "any advance discussion or thought about killing" the victim. However, the armed defendant got himself back to the area where the victim had been standing, demanded that the person who had been standing there produce himself and engaged in a discussion with this person before shooting him.[7] The jury could reasonably infer from the foregoing that defendant intended to shoot the victim from the moment he began his journey back to the place where the victim had been standing. The fact that, as defendant points out, he did not know the victim, matters little. Juries are keenly aware that certain individuals will shoot to kill over a perceived hostile facial or verbal expression, whether the victim is known to the shooter. Unfortunately, it is all too common that, as in this case, "maddogging" or the "wrong" answer to the question, "Don't you know who I am?" or saying, "What's up Holmes?" can get someone shot.

Next, defendant calls our attention to the factors the court in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*) examined in determining whether sufficient evidence of premeditation and deliberation existed in that case. Before discussing these factors, we are compelled to observe that the world today is a very different place than it was in the 1960s, when the crime in *Anderson* was committed. People are shot or killed every day for absolutely nothing. Thus, the list of factors cited in *Anderson* is not exhaustive. (*People v. Pride* (1992) 3 Cal.4th 195, 247.) In fact, "an '"[u]nreflective reliance on

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[7] Therefore, defendant's assertion that "[Defendant] encountering [the victim] was not something that was planned or expected in advance in any manner" is belied by the evidence.

Anderson for a definition of premeditation is inappropriate. . . ." [Citation.] . . . [T]he *Anderson* guidelines are descriptive, not normative. "The *Anderson* factors . . . are not a sine qua non to finding . . . premeditat[ion] . . . ."' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019.)

The first is planning activity. (*Anderson*, *supra*, 70 Cal.2d at pp. 26, 27.) We appear to have a difference of opinion with defendant over whether there was planning activity in this case. We conclude that there was—beginning with his act of returning to where the victim had been standing. The jury could have reasonably found that defendant decided to shoot the victim and thus returned to where he could find him.[8] The jury also could reasonably have concluded that defendant decided to shoot the victim during the time the victim walked up to defendant and confronted him verbally. This jury was instructed that "[t]he length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. . . . [A] cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time." As

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[8] Defendant appears to not want to deal with the facts that he returned to the place where the victim was and called out for the victim to produce himself. Thus, this was not a case in which defendant merely "pull[ed] out a gun during a confrontation where the [victim] ha[d] advanced on [him] to confront [him]" as defendant asserts. In fact, it was *defendant*, and *not the victim* that initiated the confrontation and began the process that culminated in the shooting of the victim. Contrary to defendant's assertion, premeditation and deliberation here were not based solely on the fact defendant was armed. However, they were based on what he did in returning to where he had last seen the victim, knowing himself to be armed, and summoning the victim in order to confront him.

defendant, himself, is ultimately forced to concede, "Stares were exchanged. . . . And a face-to-face confrontation came about quickly after [the victim] exited the vehicle and went over to [defendant's] location." What defendant fails to say is that premeditation and deliberation can occur during this time, based on the foregoing instruction. (See *People v. Cook* (2006) 39 Cal.4th 566, 603.) What he also fails to say is that he, not the victim, initiated the face-to-face confrontation by summoning the victim at the scene of the shooting.

The second *Anderson* factor is motive. (*Anderson, supra,* 70 Cal.2d at p. 27.) Again, we part company with defendant in interpreting the facts here. There was sufficient evidence that defendant was motivated, by the mad-dogging and/or the verbal confrontation, to shoot the victim.

Finally, as to the manner of killing (*Anderson*, *supra*, 70 Cal.2d. at p. 27.), we observe that defendant shot the victim in the chest and the lower abdomen from approximately three feet away. Defendant's assertion that he did not "go . . . to some lengths to insure that the victim is dead, as where he finishes off the victim or checks to be sure he has no pulse" has no application here as the victim survived the attack. As the People correctly point out, where the defendant fires more than one shot at close range into the victim's vital area, the jury can reasonably infer premeditation and deliberation. (*People v. Manriquez* (2005) 37 Cal.4th 547, 577, 578; *People v. Koontz* (2002) 27 Cal.4th 1041, 1082.)

b. Of Attempted Murder

Defendant contends there was insufficient evidence to support the jury's implied finding that he intended to kill the victim because he did not continue to shoot the victim after shooting him in the chest and lower abdomen. We disagree. The jury could reasonably conclude that shooting someone in those two places from three feet away indicates an intent to kill, rather than, as defendant asserts, "just shooting [the victim] to teach him a lesson about who was tougher." In contending that this was not an attempted killing but "a fight situation that escalated to the firearm level" defendant again ignores the facts that he returned to where the victim had been, summoned the victim to that spot and shot him with the gun he brought to the scene.[9] We have no doubt that had the victim not received the prompt medical attention he did, he would have died. That medical intervention was "[the] interruption by circumstances independent of . . . the will of the . . . attempter" which defendant asserts is necessary in any case of attempt.

2. *Jury Instructions on Self Defense*

Pertinent provisions of the instructions on perfect and imperfect self-defense, respectively, are as follows:

"The defendant is not guilty of . . . attempted murder . . . if []he . . . was justified in . . . attempting to kill someone in []self-defense . . . if: [¶] 1. The defendant reasonably believed that []he . . . was in imminent danger of being killed or suffering

[9] The witnesses gave varying accounts of how many bullets were fired, with one saying that defendant continued to fire into the air after two bullets hit the victim. However, only two shell casings were found at the scene, thus discrediting the claims that more than two bullets had been fired.

great bodily injury . . . ; [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defendant against that danger. [¶] . . . The defendant must have believed there was imminent danger of great bodily injury to []himself . . . . Defendant's belief must have been reasonable and []he . . . must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the []attempted[] killing was not justified. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed." (Judicial Council of California Criminal Jury Instructions, CALCRIM No. 505.)

"A[n attempted] killing that would otherwise be murder is reduced to [attempted] voluntary manslaughter if the defendant [attempted to] kill . . . a person because []he acted in []imperfect self-defense . . . . [¶] If you conclude that defendant acted in complete []self-defense . . . , []his . . . action was lawful and you must find []him . . . not guilty of any crime. The difference between complete []self-defense . . . and []imperfect self-defense . . . depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in []imperfect self-defense . . . if: [¶] 1. The defendant actually believed that []he . . . was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the

immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable. [¶] . . . [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to defendant." (CALCRIM No. 571.)

The record does not indicate that defendant requested instructions on self-defense. Defense counsel noted on the record that there had been discussion (which was either not reported or not transcribed) about them and the trial court had stated that there was no evidence to support them.[10] When the trial court asked defense counsel what evidence of self-defense there was, and commented that it could not see any, defense counsel responded, "Right. Just so . . . it is on the record that I had . . . brought the issue up."

The trial court was correct. There was no evidence of self-defense. Defendant never testified and no statement he made about the incident was introduced into evidence. Therefore, the jury would have had to infer defendant's belief at the time he shot the victim based on the circumstances. Those circumstances were that defendant was on the victim's property and, in a challenging fashion, summoned the victim in order to accost him. Defendant then made a second challenging statement specifically to the victim, i.e., "Don't you know who I am?" These circumstances do not provide an adequate basis for the jury to infer that defendant had the beliefs necessary to support either perfect or imperfect self defense.

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[10] The record contains the prosecutor's list of requested instructions, but not one from defense counsel. A three page chart of requested instructions in the Clerk's Transcript shows that defendant requested three instructions, none of which related to self defense, and all of which were given by the trial court.

While, as defendant here points out, the victim told the police that he had his hands in his pocket while he and defendant were conversing before the shooting, this, alone, did not create the basis for the necessary belief in the need to defend himself, regardless of its reasonableness. Defendant's current attempt to describe the facts here as the victim entering defendant's comfort zone ignores the facts that defendant was on the victim's property and had summoned the victim to meet him there.[11] Mad-dogging, even if it was mutual, would not have justified, either perfectly or imperfectly, defendant trying to kill the victim. The fact that defendant was backing up when firing also did not permit an inference that defendant felt threatened by the victim—it was obvious he was backing up as the beginning of his flight from the scene. Defendant also misconstrues evidence in an attempt to make it seem as though he was confronted by two men, not just the victim, and therefore shot the victim in self defense. An investigator from the district attorney's office was asked at trial, "[W]hen you spoke to [the victim's companion], did he tell you whether or not he was with [the victim] *the night* [*the victim*] *got shot*? The investigator responded, "He said he was standing right next to him." Contrary to defendant's assumption, this did not mean that the companion was standing right next to the victim when the victim got shot, just that he was standing next to the victim at some point during the entire incident. In fact, the companion did not testify at trial as to where he was. Instead, he claimed that he could not remember anything because he was high

[11] Defendant asserts, "[The victim] approached [defendant], not the other way around." What he fails to appreciate, however, is that the victim approached defendant in response to defendant's demand that the victim produce himself.

that night. In his statement to the police, however, he said that he had just come out of the house when the shooter asked where the person was that had been standing there earlier, but he never said he was close to the victim when the victim was shot and neither did any of the other witnesses to the shooting, including the victim. In fact, the companion told the police that he took off running as soon as the first shots were fired and he circled the house, then returned to where the wounded victim was lying. He had to ask the victim if the victim had been shot, which suggests that he was not in the immediate vicinity of the victim at the time of the shooting or he would know that the victim had been shot. Moreover, he told the police that he was next to the small car when the victim was shot. On cross examination at trial of the detective who questioned the companion, the detective said that the companion never said how far away from the victim he was standing when the victim was shot.

DISPOSITION

The trial court is directed to amend the indeterminate abstract of judgment to show that this was a jury, not a court trial as the abstract currently states, to uncheck the box at 6c, which currently states that a term of 7 years to life was imposed and to show that a term of 25 years to life was imposed for the gun discharge true finding, not 25 years as the abstract currently states. The trial court is directed to amend the determinate abstract of judgment to show that this was a jury, not a court trial as the abstract currently states. The court is further directed to amend the minutes of the sentencing hearing to show that two, not three, as is currently stated, prison prior allegations were found true by the trial court, the sentence for attempted murder (count 1) is life, not 7 years to life as minutes

currently state, the total term is life plus 25 years to life, not 32 years to life as the minutes currently state. Finally, the trial court struck two prison priors, not three, as the abstract currently states, so the abstract must be amended and a copy sent to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

RICHLI
J.